

August 11, 1997

Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

RECEIVED

AUG 11 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Rules and Policies) IB Docket No. 97-142
of Foreign Participation)
In the U.S. Telecommunications Market)

REPLY COMMENTS OF THE SECRETARY OF DEFENSE

The Secretary of Defense, for the Department of Defense
and as Executive Agent of the National Communications System¹,

¹Executive Order 12472, Assignment of National Security and Emergency Preparedness Telecommunications Functions, April 3, 1984, (49 Fed. Reg. 13471, 1984), established the National Communications System (NCS), which consists of an administrative structure involving the Executive Agent, Committee of Principals, Manager, and the telecommunications assets of the Federal organizations which are represented on the Committee of Principals. Section 1(e) of Executive Order 12472 designates the Secretary of Defense as Executive Agent of the NCS. By direction of the Executive Office of the President, the NCS member organizations (which are represented on the Committee of Principals) are: Department of Agriculture, Central Intelligence Agency, Department of Commerce, Department of Defense, Department of Energy, Federal Emergency Management Agency, General Services Administration, Department of Justice, National Aeronautics and Space Administration, the Joint Staff, Department of State, Department of Transportation, Department of Treasury, U.S. Information Agency, the Department of Veterans Affairs, Department of Health and Human Services, Department of the Interior, National Security Agency, the National Telecommunications and Information Administration and the Nuclear Regulatory Commission. The Federal Communications Commission, the United States Postal Service and the Federal Reserve Board also participate in the activities of the NCS. The vast majority of the telecommunications assets of these 23 organizations are leased from commercial communications carriers and serve the National Security and Emergency Preparedness (NS/EP) needs of the Federal government as well as State and local governments.

through duly authorized counsel, pursuant to Section 201 of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. Section 481, and the Memorandum of Understanding between the Department of Defense and the General Services Administration dated November 27, 1950, hereby files these Reply Comments in response to the above captioned notice.

In these Reply Comments, DOD reiterates its strong support of the Commission's commitment to continue to consider national security as an important component in its public interest review. We urge the Commission not to apply any presumption in favor of approval of an application with respect to the public interest review for national security, a review which should be apart from and in addition to the policies surrounding the ECO test. Additionally, the Commission should continue its existing practice of deferring to the Executive Branch on matters affecting national security. There is simply no justification to change the Commission's long standing and effective practice with respect to the public interest review relating to national security.

The Comments of the United States Trade Representative clearly support the DOD position that national security should remain a part of the public interest review. The United States Trade Representative states, ". . . the Commission needs to continue to accord deference to the Executive Branch as set out in the *Foreign Carrier Entry Order* when weighing the other factors affecting the public interest -- national security and law enforcement concerns and foreign and trade policy issues."²

Deutsche Telekom and others have asked the Commission not to apply a public interest test at all when reviewing applications from carriers indirectly controlled by an entity based in a WTO member country.³ We urge the Commission to reject these views as this would allow foreign-owned or affiliated carriers to be treated differently from U.S.-owned carriers, as explained below.

Some of these Parties object to national security as part of the public interest review on the basis that such a factor would

² Comments of the Office of the United States Trade Representative, page 4.

³ Comments of Deutsche Telekom AG, page 18.

be "subjective, vague and undefined"⁴ or that the Commission might use a different public interest test or no test at all for U.S.-owned carriers.

National security concerns that are implicated by a foreign carrier's entry into the U.S. telecommunications market need not be vague or subjective as these comments would suggest. Additionally, these concerns certainly would rarely, if ever, require excluding a foreign carrier from the U.S. marketplace as Deutsche Telekom seems to suggest in its comments. It is possible to address national security issues in just the manner that Deutsche Telekom suggests, through non-discriminatory measures that do not require excluding the foreign carrier from the U.S. market.⁵ However, DOD believes that the best time for such a review and for the formulation of such non-discriminatory measures is at the time the carrier makes an application with the Commission to enter the market. The Commission's proposal to continue to include national security concerns in its public interest review and to continue to defer to the views of the Executive Branch on these matters is crucial. Only through such a process will national security receive the full and fair

⁴ Comments of Kokusai Denshin Denwa Co., Ltd., page 4.

⁵ Comments of Deutsche Telekom AG, page 18.

consideration it deserves.

Certainly a preliminary framework for such a review exists today in the terms of the agreement reached between Department of Defense, the FBI and MCI/BT. That agreement has been filed with the Commission and its terms and conditions, as well as the national security considerations addressed therein, are available for public review by any foreign carrier.⁶ Should the Commission condition any approval of the MCI/BT merger on the Parties' compliance with the terms of that agreement as urged by DOD, the agreement could serve as a template for future, similar mergers or for direct entry of a foreign carrier into the U.S. market. This should alleviate the transparency concerns raised by some of the Parties.

Additionally, in many cases which implicate a public interest review for national security, DOD has simply been seeking assurances that statutory obligations and requirements that fall on the shoulders of U.S.-owned carriers operating in the U.S. will also be honored by foreign-owned carriers that wish to operate in the U.S.

Kokusai Denshin Denwa Company, Ltd. (KDD) argued that the

⁶ *Exparte* Communication From John P. White, Under Secretary of Defense to Chairman Hundt in GN Docket No. 96-254, Merger of MCI Communications and British Telecommunications plc, dated May 28, 1997.

Commission might use a "different 'public interest' test or no such test at all"⁷ for U.S.-owned carriers. Under U.S. law all common carrier applicants, including all U.S.-based, U.S.-controlled applicants, are subject to a public interest review as a condition precedent to obtaining a license.⁸ Thus, the public interest review as it relates to national security is non-discriminatory by its very nature and fully in compliance with the national treatment principles of the GATS.⁹

One final note, DOD is aware that some Parties have taken the position that imposing ownership conditions on cable landing stations may violate the GATS and the WTO Agreement. If the Commission decides that such ownership restrictions are impermissible in the new environment, DOD strongly urges the Commission to address national security concerns through some

⁷ Comments of Kokusai Denshin Denwa Co., Ltd, page 4.

⁸ See for example 47 U.S.C. 214(a), 301, and 303.

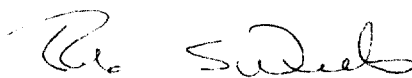
⁹ GTE has urged the Commission to "avoid new regulation and rely on the existing GATS provisions in their present form to address national security and law enforcement concerns." (GTE comments, page 16) The GATS provisions GTE is referring to are found in the General Agreement on Trade and Services (GATS) Article XIV *bis* and Article XIV(a). DOD contends that the GATS exceptions in these two Articles are not implicated in the current FCC proposals regarding national security and law enforcement because the statutory public interest review does not violate the terms of the GATS agreement. The public interest review relating to national security and law enforcement is not "new regulation" nor is it only applicable to foreign entities wishing to operate in the U.S. Public interest reviews are applicable to **all** common carriers operating in the U.S., U.S. and foreign-owned alike.

August 11, 1997

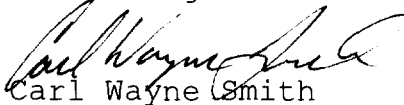
other safeguard, condition or control. As noted in our earlier comments in this Docket we were able to reach an accommodation with MCI/BT that assured control of such facilities in the event of Presidential action under 47 U.S.C. 606. Similar safeguards could certainly be made a part of future reviews under 47 U.S.C. 34.

In conclusion, the Commission should continue its long-standing practice of conducting a public interest review for common carrier radio applications and licenses. This review should continue to include national security considerations. No presumption should apply to this aspect of the public interest review and the Commission should continue to defer to the Executive Branch in these matters.

Respectfully submitted,



Rebecca S. Weeks, Lt Col, USAF
Staff Judge Advocate



Carl Wayne Smith
Chief Regulatory Counsel,
Telecommunications, DOD

Defense Information Systems Agency
701 S. Courthouse Road
Arlington, VA 22204

CERTIFICATE OF SERVICE

I, Mai Tai Powell, do hereby certify that a copy of the foregoing Reply Comments of the Department of Defense was hand delivered or sent by first class United States mail, postage paid on this the 11th day of August, 1997 to the following:

Robert J. Aamoth
Joan M. Griffin
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Suite 500
Washington, DC 20036

Masanobu Suzuki
Executive Vice President
Nippon Telegraph and Telephone
Corporation
Global Business Headquarters
20-2 Nishi Shinjuku 3-chome
Sinjuku-ku
Tokyo 163-14 Japan

Theodore W. Krauss
Danielle K. Aguto
France Telecom North America
555 13th Street, N.W.
Suite 1100 East
Washington, DC 20004

Leon M. Kestenbaum
Kent Y. Nakamura
Sprint Communications Company,
L.P.
1850 M. Street, N.W.
11th Floor
Washington, DC 20036

R. Michael Senkowski
John B. Reynolds, III
Todd D. Daubert
Wiley, Rein & Fielding
1776 K Street N.W.
Washington, DC 20006

Daniel L. Poole
US WEST, INC.
1801 California Street
Suite 5100
Denver, CO 80202

Mary McDermott
Linda Kent
Keith Townsend
Hance Haney
1401 H. Street N.W.
Suite 600
Washington, DC 20005

James D. Ellis
Robert M. Lynch
Timothy P. Leahy
175 E. Houston, Room 1254
San Antonio, TX 78205

Stanley J. Moore
5850 W. Las Positas Blvd.
Pleasanton, CA 94588

Gregory C. Staple
R. Edward Price
Koteen & Naftalin, LLP
1150 Connecticut Avenue, N.W.
Suite 1000
Washington, DC 20036

Paul J. Sinderbrand
William W. Huber
WILKINSON, BARKER, KNAUER &
QUINN
1735 New York Avenue, N.W.
Washington, DC 20006

Madeleine Elizabeth Wall
Group Director of Legal &
Regulatory Affairs
Cable & Wireless, plc
124 Theobalds Road
London WC1X8RX, United Kingdom

Philip V. Permut
Joan M. Griffin
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Suite 500
Washington, DC 20036

Michael J. Shortley, III
Senior Attorney and Director
Regulatory Services
Frontier Corporation
180 South Clinton Avenue
Rochester, NY 14646

Timothy R. Graham
Leo I. George
Joseph M. Sandri, Jr.
Barry J. Ohlson
1146 19th Street N.W.
Suite 200
Washington, DC 20036

Ng Cher Keng
Director (Policy)
TAS
35 Robinson Road
TAS Building
Singapore 0106

John L. Bartlett
Wiley, Rein & Fielding
1776 K Street N.W.
Washington, DC 20006-2304

Wayne V. Black
C. Douglas Jarrett
Brian Turner Ashby
KELLER AND HECKMAN LLP
1001 G. Street, N.W.
Suite 500 West
Washington, DC 20001

Henry Goldberg
Joseph A. Godles
Mary Dent
GOLDBERG, GODLES, WIENER &
WRIGHT
1229 19th Street N.W.
Washington, DC 20036

Sheldon M. Goldman
Vice President
Business and Legal Affairs
VIATEL INC.
800 Third Avenue
New York, NY 10022

Aileen A. Pisciotta
Joan M. Griffin
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Suite 500
Washington, DC 20036

William B. Barfield
David G. Richards
1155 Peachtree Street, N.E.
Atlanta, GA 30309

Michael K. Kellogg
Austin C. Schlick
KELLOGG, HUBER, HANSEN, TODD &
EVANS
1301 K. Street N.W.
Suite 1000 West
Washington, DC 20005

Gary M. Epstein
Teresa D. Baer
LATHAM & WATKINS
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004

Margaret M. Charles
Maria L. Cattafesta
SWIDLER & BERLIN, CHARTERED
3000 K. Street, N.W.
Suite 300
Washington, DC 20007

Christopher M. Bennett
NYNEX Long Distance Company
1095 Avenue of the Americas
Room 3828
New York, NY 10036

Mario Roberto Paz
Superintendencia De
Telecomunicaciones
Guatemala C. A.

Frank Michael Panek
Room 4H84
2000 W. Ameritech Center Dr.
Hoffman Estates, IL 60196-1025

Sanford C. Reback
Carol R. Schultz
Larry Blosser
1801 Pennsylvania Avenue, N.W.
Washington, DC 20006

Alfred M. Mamlet
Maury D. Shenk
Colleen A. Sechrest
STEPTOE & JOHNSON, LLP
1330 Connecticut Ave., N.W.
Washington, DC 20036-1795

Joel S. Winnik
HOGAN & HARTSON LLP
Columbia Square
555 13th Street N.W.
Washington, DC 20004-1109

Cheryl Lynn Schneider
BT NORTH AMERICA INC.
North Building, Suite 725
601 Pennsylvania Ave., N.W.
Washington, DC 20004

Leslie Harris
New T&T Hong Kong Limited
5/F New T&T Centre
Harbour City
Tsim Sha Tsui
Kowloon, Hong Kong

Mark C. Rosenblum
Lawrence J. Lafaro
James J. R. Talbot
295 N. Maple Avenue
Room 3252H3
Basking Ridge, NJ 07920

Roger W. Pincus
U.S. Dept. Of Justice
Office of Intelligence Policy
& Review
950 Pennsylvania Avenue, N.W.
Suite 6325
Washington, DC 20530

Wei Fong
20 Floor 169, Jen ai Road,
Sec 4
Taipei, 106, Taiwan

Albert Halprin
Randall Cook
Halprin, Temple, Goodman &
Sugrue
Suite 650 East Tower
100 New York Avenue, N.W.
Washington, DC 20005

Jeffrey P. Cunard
Debevoise & Plimpton
555 13th Street, N.W.
Suite 1100 East
Washington, DC 20004

Gerard Moine
Alain-Louis Mie
Jean-Louis Burillon
FRANCE TELECOM
Public Affairs Directorate
6, Place d'Alleray
75505 Paris Cedex 15
France

Gail L. Polivy
GTE Service Corporation
1850 M. Street, N.W.
Suite 1200
Washington, DC 20036

Ward W. Wueste
GTE Service Corporation
One Stamford Forum
Stamford CT 06904

A. Bradley Shingleton
DEUTSCHE TELEKOM, INC.
1020 19TH Street, N.W.
Suite 850
Washington, DC 20036

Hans-Willi Hefekauser
DEUTSCHE TELEKOM AG
Friedrich-Ebert-Allee 140
Bonn
Germany

Junichiro Miyazaki
Embassy of Japan
2520 Massachusetts Ave, N.W.
Washington, DC 20008

George Y. Wheeler
Koteen & Naftalin, LLP
1150 Connecticut Avenue, N.W.
Suite 1000
Washington, DC 20036

J. Jeffrey Craven
Jeffrey L. Ross
PATTON BOGGS, LLP
2550 M Street, N.W.
Washington, DC 20037

Janice Obuchowski
Michael Wack
NextWave Telecom Inc.
1101 Pennsylvania Avenue, N.W.
Suite 805
Washington, DC 20005

Kevin McGilly
Rohit Menezes
Freedom Technologies, Inc.
1100 New York Avenue, N.W.
Suite 650 East Tower
Washington, DC 20005

Philip L. Verveer
Jennifer A Donaldson
Gunnar D. Halley
WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20036

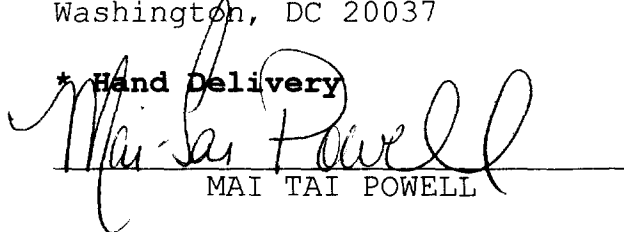
Kailas J. Rao, Ph.D.
Richard E. Kinder, Jr.
Michael J. Flanigan
INDUS, INC
777 East Wisconsin Avenue
Suite 1900
Milwaukee, WI 53202

Ambassador Jeffrey M. Lang
Deputy U.S. Trade
Representative
Office of the U.S. Trade
Representative
600 17th Street, N. W.
Washington, DC 20506

Mr Douglas A. Klein*
International Bureau
Federal Communications
Commission
2000 M Street, N.W.
Suite 800
Washington, DC 20554

ITS*
2100 M Street, N.W., Suite 140
Washington, DC 20037

* Hand Delivery


MAI TAI POWELL